Filed 8/10/04 P. v. Smith CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY RAY SMITH,

Defendant and Appellant.

F044714

(Super. Ct. No. 1053046)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. David G. Vander Wall, Judge.

Roshni Mehta, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Harris, Acting P.J., Levy, J. and Gomes, J.

STATEMENT OF THE CASE

On February 11, 2003, the Stanislaus County District Attorney filed a first amended criminal complaint in superior court charging appellant as follows: count I—stalking (Pen. Code, § 646.9, subd. (a)) while on bail pending judgment on prior felonies (§ 12022.1); count II—misdemeanor making of annoying phone calls with threats (§ 653m, subd. (a)); and count III—misdemeanor making of annoying phone calls (§ 653m, subd. (b)).

On February 14, 2003, appellant was arraigned, pleaded not guilty to the substantive counts, and denied the special allegation.

On May 28, 2003, appellant withdrew his not guilty plea and entered into a plea agreement with the prosecution. Appellant pleaded guilty to count I in exchange for dismissal of the remaining counts and the special allegations. The court sentenced appellant to the Department of Corrections for the upper term of three years, suspended execution of the sentence, and granted appellant three years of formal probation subject to service of 300 days in county jail, among other conditions. The court imposed a $600 restitution fine (Pen. Code, § 1202.4, subd. (b)) and imposed and suspended a second such fine pending successful completion of parole (§ 1202.45). The court also ordered appellant to comply with a restraining order preventing contacts with his former wife, Stephanie Smith.

On October 23, 2003, the Stanislaus County Probation Officer filed a violation of probation report in superior court alleging appellant contacted Stephanie Smith on several occasions after his release from county jail.

On October 30, 2003, the court conducted a contested hearing and found that appellant had violated his probation.

On November 21, 2003, appellant wrote to the Honorable David G. Vander Wall, judge of the superior court, claimed his trial counsel was ineffective, accused Stephanie

of engaging in manipulation, and asked for a second chance so he could be with his family for Christmas.

On December 4, 2003, the court conducted a sentencing hearing, received a letter from appellant accusing his counsel of ineffectiveness, and heard a witness on appellant's behalf. After hearing the arguments of counsel, the court denied appellant probation, sentenced him to state prison for three years, imposed a $600 restitution fine (§ 1202.4, subd. (b)), and imposed and suspended a second such fine pending successful completion of parole (§ 1202.45). The court also awarded 374 days of custody credits.

On January 13, 2004, appellant filed a timely notice of appeal "based solely on grounds occurring after entry of a plea that do not challenge the validity of the plea."

STATEMENT OF FACTS

Facts Relating to the September 20, 2003 Incident at the Sidelines Bar

On May 28, 2003, appellant pleaded guilty to stalking (Pen. Code, § 646.9, subd. (a)). The victim of the charged conduct was his former wife, Stephanie Shafer Smith. The court sentenced appellant to the Department of Corrections for the upper term of three years, suspended execution of the sentence, and granted appellant three years of formal probation subject to service of 300 days in county jail, among other conditions. As a further condition of probation, the court ordered appellant to comply with a restraining order prohibiting contact with Stephanie. The restraining order specifically stated:

> "Shall not … contact in person, by phone, mail, electronically, or through another person, annoy, harass, molest, stalk, strike, assault, threaten, batter or sexually assault, be within 100 yards of, have any contact with, be in the company of Stephanie Smith (for 10 years)."

Authorities released appellant from jail on September 19, 2003. On September 20, 2003, appellant went to the Sidelines Bar, a Modesto establishment where he had met Stephanie, a place they frequent together while married, and a place appellant continued to frequent after his separation from Stephanie. At the October 30, 2003, violation of

probation hearing, appellant testified Stephanie entered Sidelines about two or three hours after he arrived at the bar. Stephanie testified she did not see appellant's vehicle, a distinctive Ford Thunderbird, as she walked into the bar. Upon her arrival, she went to use the restroom. When she left the restroom, appellant grabbed her left arm, swung her around, and asked whether she had slept with one Tim Chaney on Christmas Eve. Stephanie shoved appellant away, walked to the other end of the bar, and then departed Sidelines after five to 10 minutes. Appellant remained on the premises.

Facts Relating to a September 23, 2003 Incident at Stephanie's Workplace

Stephanie worked for Paramount Builders in an Oakdale commercial park. The Paramount Builders office complex had a parking lot located in front. A six-foot high, chain-link fence with wooden slats separated the Paramount Builders parking lot from that of the adjacent office complex. Stephanie was working at her desk on the afternoon of September 23, 2003. Between noon and 1:30 p.m., she saw appellant drive by in a cream-colored Ford Thunderbird. Jody Eagan worked with Stephanie at Paramount Builders and heard her make a noise. Eagan looked through the office windows and noticed appellant's older-model Thunderbird drive by the complex. Both Stephanie and Eagan saw appellant drive by four or five times. Stephanie eventually called the police. Appellant ultimately pulled into the parking lot on the other side of the fence, got out of his car, and looked around the fence at Stephanie's car. He then walked back to his car and drove away.

Facts Relating to Appellant's Telephone Calls to Stephanie

After Stephanie learned that appellant had been released from custody, she received telephone calls from him at her place of employment. Appellant regularly called Stephanie for two weeks, from September 23 to approximately October 2, 2003. He called her once a day the first week and twice a week the second week. Stephanie kept a log of the telephone calls she received from appellant. She did not call the police, the probation officer, or the district attorney after receiving the first phone call. Instead, she

waited until the calls became threatening. Upon being questioned as to when the calls became threatening, Stephanie testified, "Where he's yelling at me. October 1st he started yelling and said, 'Stef, call me. We need to talk,' and I hung up on him. And the second, 'Hey, it would be a lot better if you called me,' and I hung up. And he called a minute later and said, 'I miss you.' And I hung up, and on the third he said, 'Stef, I love you.'"

Defense

Facts Relating to the September 20, 2003 Incident at the Sidelines Bar

On September 20, 2003, Stanislaus County Deputy Probation Officer Randal Cambron was also at the Sidelines Bar and spoke with appellant. At some point, he noticed Stephanie walk toward the bathroom. Appellant was seated at a stool at the bar when Stephanie approached the bathroom. Cambron did not see Stephanie walk out of the bathroom because he left the bar in the meantime.

Appellant was aware of the conditions of his probation. After being sentenced and serving 300 days in county jail, he was released on September 19, 2003. Appellant said it was his custom to go to Sidelines on Friday and Saturday evenings. He went alone to Sidelines on September 20, 2003, and parked his distinctive, cream-colored 1965 Thunderbird in the front space on the right-hand side of the entrance. Upon entering Sidelines, appellant had a conversation with Randal Cambron. Two to three hours after appellant arrived, he saw Stephanie enter Sidelines. She walked next to appellant at the bar, ordered a beer, and a brief discussion ensued. Appellant denied grabbing Stephanie. When Stephanie left Sidelines, appellant went to the door with the doorman. They watched Stephanie walk by appellant's car, enter her own vehicle, and drive off.

On Sunday, September 21, appellant called the police and reported the incident that took place at the Sidelines Bar. Appellant said he made the call to ensure he did not violate his probation and to report that Stephanie was causing trouble at the bar. On

Monday, September 22, appellant personally went to the probation office and again reported the incident.

Facts Relating to the September 23, 2003 Incident at Stephanie's Workplace

Appellant denied going to Stephanie's place of employment or of even being in the area of her workplace on September 23, 2003. He also denied knowing the location of her workplace. Appellant said his car was out of gas on September 23 and he borrowed a neighbor's car to go to a job interview. Appellant nevertheless called the probation office about the incident at Stephanie's workplace because a friend had told appellant about her allegations.

Facts Relating to Appellant's Telephone Calls to Stephanie

Appellant denied making any telephone calls to Stephanie between the time he was released from custody on September 19, 2003 and October 3, 2003.

DISCUSSION

Appellant's appointed counsel has filed an opening brief which adequately summarizes the facts and adequately cites to the record and asks this court independently to review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) By letter of April 29, 2004, this court invited appellant to submit additional briefing and state any grounds of appeal he may wish this court to consider. On May 13, 2004, appellant filed a supplemental letter brief alleging: (1) the trial court abused its discretion by imposing the upper term of three years for the first violation of probation; and (2) his trial counsel was ineffective by failing to call various witnesses to impeach Stephanie's testimony.

A. The Upper Term of Imprisonment

Appellant argues:

> "… I feel that Judge Vanderwall was not obligated to impose the [aggravated] term of 3 years for the first violation of probation. I base this on the remarks the Judge made during sentencing of ('How would it look if I didn't give Mr. Smith the 3 years'.) Also the fact that he never said that he was obligated by law to impose the 3 years. I have also looked at a case

history People v. Howard (1997) [16 Cal. 4th 1081] where it looks to me that the Judge in that case had all kinds of options besides imposing the [aggravated] term.…" (Brackets in original.)

On May 28, 2003, after appellant's change of plea, the Honorable Aldo Girolami sentenced appellant in the following manner:

"THE COURT: You understand although you're not going to go to state prison, you will have a state prison sentence of three years suspended. The possible punishment for this crime is 16 months, two or three years, and the agreement is that it be three years suspended. And during the three year felony probation, if you violate the terms of your probation, you will go to state prison for three years, do you understand that?

"THE DEFENDANT: Yeah. [¶]...[¶]

"THE COURT: ... The Court is selecting the aggravated term based on the number of cases that have been dismissed in this case and the ongoing situation that was involved and the stipulation of the parties.

"So the sentence is three years. However, execution of that sentence is suspended for a period of three years on the following conditions. Pay close attention, Mr. Smith, 'cause if you violate them ... you will in fact go to state prison. [Court recites the conditions.]"

On December 4, 2003, after finding appellant in violation of probation, Judge Vander Wall conducted a sentencing hearing and the following exchange occurred:

"THE COURT: Okay. Your position, I know, Ms. Rees [deputy district attorney], three years would be imposed. That was the agreement based on his prior behavior and subsequent behavior that caused the subsequent violation. [¶]...[¶] Okay. Mr. Orenstein [defense counsel], what do you want to say?

"MR. ORENSTEIN: No. 1, I think if the court recalls the probation violations hearing, I think Stephanie Smith's credibility is definitely questionable.… [¶]...[¶]

"But the Court found that my client was in violation, but I think the violations that the Court looked at and heard are such that it doesn't cry out for a three-year state prison term. Not at all. I think that's excessive.

"THE COURT: As Ms. Rees pointed out, wasn't the three-year term agreed upon, not only based on what might happen subsequent but also the prior conduct in all of the cases she pled out to Judge Girolami?

"MR. ORENSTEIN: There's no question that three years was the agreed-upon term. There was no question there were cases dismissed. There was no question that my client got a certain amount of preliminary local incarceration. That doesn't in any way suggest that the Court does not have the ability and the discretion to impose a sentence less than three years.

"THE COURT: I'm not saying I don't have discretion. What I'm saying is if at any time you made the agreement it was contemplated that certain things would be, there was a basis behind that. And any subsequent behavior, as Judge Girolami clearly instructed him, would result in a state prison sentence. And what you're arguing to me today is what you basically argued at the time of the VOP, that she [Stephanie] wasn't credible, and I didn't find that to be true …. [¶]...[¶]

"MR. ORENSTEIN: Here's my point: My point is that in terms of the three years state prison suspended term, any state prison suspended term is a specific number of years. And this case is no different than any other state prison suspended case that the Court in this case, just like in any other state prison case, has the authority, the discretion to impose a sentence less than the state prison suspended case.

"THE COURT: Obviously that's clear. The question is why should I? [¶]...[¶]

"MR. ORENSTEIN: I'm telling you why, and that is that her [Stephanie's] behavior is not of someone whose credibility is 100 percent to be believed. It isn't. You don't go to a bar knowing that your husband who has just been in jail for a year is getting – had gotten out, a bar that he frequents on a regular basis. Why do you go there knowing that most likely he's going to be there?

"THE COURT: Well, now you just raised that same argument, I just told you all a minute ago that same argument you raised at the VOP hearing. I rejected that argument.... [¶]...[¶]

"MR. ORENSTEIN: … The bottom line is she had to see his vehicle there when she arrived. It's clear. It's reasonable. It shouldn't be argued that she didn't know he was there when she arrived. He had a very distinctive vehicle. Then hear from the Reverend [Jack Bullock, who testified on appellant's behalf at sentencing] that she tried to extort $25,000 from him

[appellant] in exchange for dropping the charges. What type of individual would do that? It's not the type of individual that I think my client deserves a three-year state prison sentence for.

"The Court has the authority in any state suspended case not to impose the amount of time that was suspended. This is no different than any other state prison suspended case.... [W]hat is argued is that the Court does have the authority, discretion to impose something less. [¶]...[¶]

"THE COURT: What about in Oakdale?

"MR. ORENSTEIN: What was contact? There wasn't any contact. He was accused of driving to her place of work and peering over the fence. If the Court recalls, there was no contact. I mean physical contact didn't exist.

"THE COURT: Okay.

"MR. ORENSTEIN: There was some phone calls. If the Court recalls, that was the totality of the behavior.

"THE COURT: Okay. Ms. Rees, I take it you interpret that as talking?

"MS. REES: I would characterize it as continuing the very same conduct which landed him in jail with three years hanging over his head, and that was hopefully to insure the victim's peace of mind and safety. And within 24 hours he's back at the very same contact again and asking the Court to impose the suspended sentence. [¶]...[¶]

"THE COURT: Okay. I mean I may have discretion to reduce the sentence down. I don't see any basis to do that in this particular case. This behavior engaged in exactly, as Ms. Rees points out, engaged in when the deal was made and he got the suspended sentence …."

At the conclusion of the hearing, the court imposed sentence as follows:

"All right. Based on the facts of the case, everything the Court has heard, Court feels that the sentence originally imposed by Judge Girolami the appropriate one. [¶] Further, probation is denied. [¶] Defendant's sentenced to a prison term of three years. Has to pay and already been ordered to pay a restitution fine. [¶]…[¶] $200, now, times three for a total of $600 pursuant to Penal Code Section 1202.4 and revocation fine pursuant to 1202.45 in the same amount of $600."

California Rules of Court, rule 4.435 states:

"(a) When the defendant violates the terms of probation or is otherwise subject to revocation of probation, the sentencing judge may make any disposition of the case authorized by statute.

"(b) Upon revocation and termination of probation pursuant to section 1203.2, when the sentencing judge determines that the defendant shall be committed to prison:

"(1) If the imposition of sentence was previously suspended, the judge shall impose judgment and sentence after considering any findings previously made and hearing and determining the matters enumerated in rule 4.433(c). [¶] The length of the sentence shall be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term nor in deciding whether to strike the additional punishment for enhancements charged and found.

"(2) If the execution of sentence was previously suspended, the judge shall order that the judgment previously pronounced be in full force and effect and that the defendant be committed to the custody of the Director of Corrections for the term prescribed in that judgment."

The May 28, 2003, minute order setting forth the terms of appellant's formal probation specifically stated: "EXECUTION of sentence upon the Defendant be and the same is hereby suspended for a term of 3 years from the date hereof, during which time the Defendant is admitted to Probation and committed to the charge and supervision of the Probation Officer of said County of Stanislaus and of this Court …." Appellant received a copy of the foregoing probation order and terms on May 28, 2003, and signed a copy of the order. Pursuant to California Rules of Court, rule 4.435(b)(2), Judge Vander Wall properly sentenced appellant to the three-year term prescribed by Judge Girolami, the execution of which was suspended.[1]

[1] Where sentence is imposed and execution thereof suspended, an appeal may be taken from the sentence to state prison as the final judgment or an order granting probation as an order made after judgment. Where neither the defendant nor the People appeals therefrom, the trial court is without jurisdiction to modify or change the final judgment and is required to order into execution that judgment after revocation of probation.

B. Alleged Ineffectiveness of Counsel

Appellant maintains he "would have been set free instead of being sentenced to the aggr[a]vated term of 3 years" had counsel subpoenaed certain witnesses he had requested. These witnesses included: (1) Dave Sousa, a bartender at Sidelines; (2) "Mike," the doorman at Sidelines; and (3) his Modesto neighbors, Allen and Benjamin George.

According to appellant, Sousa would have testified that appellant went to his, Sousa's home, upon release from local custody on September 19, 2003. During their conversation, Sousa said he had not seen Stephanie at Sidelines for months and Sousa invited appellant out for dinner and drinks. According to appellant, "[t]his would have negated the Judge thinking I went there looking for Stephanie."

Appellant represented that "Mike" saw where Stephanie parked her vehicle at Sidelines and would have testified that her car was approximately 20 feet away from appellant's "Classic 65 T bird." Among other things, appellant claimed Mike's testimony would have established that (a) she knew appellant was at Sidelines that evening; (b) she "showed up just to cause trouble"; and (c) Stephanie lied in court when she said she did not drive on that evening at Sidelines because Mike saw her drive away from the premises. Appellant argues that Mike's testimony "would have proven that not only was she lying about the fact she was not driving but also she was probably lying about other things also such as all the phone calls she claims I made."

As to the Georges, appellant claims his 1989 Chevrolet pickup truck broke down between 12:30 p.m. and 1:00 p.m. on September 23, 2003, and that Benjamin George helped him retrieve the disabled vehicle and bring it back home. Appellant also claimed

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(*People v. Chagolla* (1984) 151 Cal.App.3d 1045, 1049; *People v. Colado* (1995) 32 Cal.App.4th 260, 262-263.)

that Allen George allowed him to use his car to go to a job interview later that day. According to appellant, the Georges would have testified that he borrowed Allen's vehicle between 4:30 p.m. and 6:00 p.m. that day and was at home the remainder of the day.

A defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414.) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

An appellant bears the burden of proving ineffective assistance of trial counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In demonstrating prejudice, an appellant must establish that as a result of counsel's failures the trial was unreliable or fundamentally unfair. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. (*In re Visciotti* (1996) 14 Cal.4th 325, 352.) As the United States Supreme Court has observed, the prejudice component of ineffective assistance focuses on the question whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 372.) A reviewing court will find prejudice when a defendant demonstrates a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*People v. Gurule* (2002) 28 Cal.4th 557, 610-611; *In re Neely* (1993) 6 Cal.4th 901, 908-909.)

If, as here, the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) Here, trial counsel could have reasonably concluded that appellant's proffered witnesses would not have bolstered his defense or overcome the strong credibility of his former spouse, Stephanie Smith, and her workplace supervisor, Jody Eagan. Moreover, a counsel has no duty to call witnesses who will testify untruthfully, and in fact has an ethical obligation not to present perjured testimony. (*People v. Spirlin* (2000) 81 Cal.App.4th 119, 126-127.) Although we cannot assess the credibility of appellant's potential witnesses, our review of counsel's performance is a deferential one and we must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*In re Jones* (1996) 13 Cal.4th 552, 561.) Appellant's claim of ineffective assistance of counsel must be rejected on direct appeal.

Our independent review discloses no other reasonably arguable appellate issues. "[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel's professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment." (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

The judgment is affirmed.